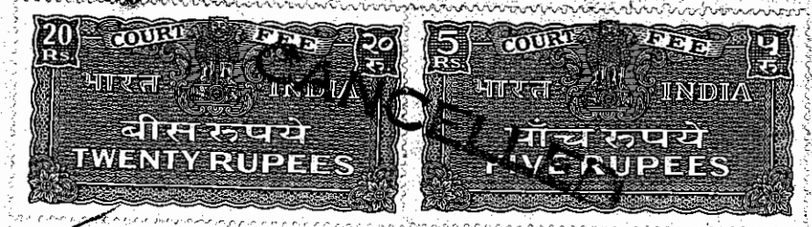

CANCELLED

3

IN THE HIGH COURT OF JUDICATURE AT JABALPUR, M.P.

WRIT PETITION NO. 3472 OF 1996

PETITIONER: Ashok Kumar Dubey, aged 41 years, son of Shri Shiv Narayan Dubey, Assistant Engineer, Madhya Pradesh Adyogik Kendra Vikas Nigam, Raipur.

V/s

RESPONDENTS:

1. Madhya Pradesh Adyogik Kendra Vikas Nigam, Raipur, through its Managing Director, B/4, M.R.Colony, Shailendra Nagar, Raipur.

2. Shri D.K.Kulshreshth, Deputy Project Engineer, Madhya Pradesh Adyogik Kendra Vikas Nigam, B/4, M.R.Colony, Shailendra Nagar, Raipur.

WRIT PETITION UNDER ARTICLES 226/227 OF THE CONSTITUTION OF INDIA FOR ISSUANCE OF AN APPROPRIATE WRIT, DIRECTION AND/OR ORDER.

20 COURT FEE 20 Rs. भारत INDIA बीस रुपये TWENTY RUPEES

CANCELLED

5 COURT FEE 5 Rs. भारत INDIA पाँच रुपये FIVE RUPEES

3

IN THE HIGH

WRIT PETITI

PETITIONER:

RESPONDENTS

R-3. Chhattisgarh State Industrial Development Corporation, Through its Managing Director, Near L.I.C. Bhawan, Pandri, Raipur (C.G.).

WRIT PETIT
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JABALPUR

112 A.F.R

HIGH COURT OF CHHATTISGARH, BILASPUR

Writ Petition No. 3472 of 1996

Ashok Kumar Dubey
Vs.
Madhya Pradesh Audhyogik Kendra
Vikas Nigam and others

ORDER

Post for 09.11.2006

Sd/-
Sunil Kumar Sinha
Judge

HIGH COURT OF CHHATTISGARH, BILASPUR

Writ Petition No. 3472 of 1996

Ashok Kumar Dubey
Vs.
Madhya Pradesh Audhyogik Kendra
Vikas Nigam and others

Appearance:

Shri Prashant Jayaswal, Senior Advocate with Shri Ali Asgar Advocate for the petitioner.

Shri Gautam Bhaduri, counsel for respondents no.1 & 3.

Shri S.P. Sharma, counsel for respondent no.2.

ORDER
(09.11.2006)

Sunil Kumar Sinha, J,

(1) By way of this writ petition, the petitioner has prayed to quash the promotion of respondent no.2 vide order dated 06.7.1996 filed as Annexure P-6 with a direction to the concerned respondents to constitute a fresh Departmental Promotion Committee (D.P.C.) and issue proper direction to the D.P.C. on the criteria for promotion.

(2) The brief facts are that the petitioner was appointed as Junior Engineer on 26.3.1982. He was promoted to the post of Assistant Engineer with effect from 08.1.1990. Prior to the alleged D.P.C. he had completed 5 years service on the post of Assistant Engineer as statutorily required for consideration to the next higher post. The next higher post is the post of Deputy Project Engineer. In the D.P.C., the case of the petitioner as well as respondent no.2 both were considered and ultimately on the recommendations of the D.P.C. respondent no.2 was promoted vide order dated 06.7.1996 which has been impugned in this writ petition. The rules applicable in case of the petitioner are The Madhya Pradesh Audyogik Kendra Vikas Nigam Maryadit Karmachari Sewa Niyam 1994-1995 (hereinafter referred to as the Rules) and the criteria for promotion is *seniority-cum-merit.*

It is the case of the petitioner himself that the respondent no.2 was senior to him as his name comes at Serial No.2 and the name of the petitioner comes at Serial No.3 of the gradation list published on 01.04.1995 filed as Annexure P-2.

(3) The petitioner challenges the promotion of respondent no.2 on the ground that the services of respondent no.2 were not satisfactory as prior to 1984, the respondent no.2 was imposed with the penalty of withholding of increment for one year and thereafter again a departmental enquiry was instituted against him and in the said enquiry he was imposed with penalty of warning. Raising these two points only, the contention of learned senior counsel for the petitioner was that in the above facts and circumstances, respondent no.2 could not have been promoted as compared to the petitioner who has not been imposed with any penalty and no adverse remarks have been made against him. The overall submission was that between the petitioner and respondent no.2, the petitioner was a better candidate and he should have been recommended for promotion superseding the case of respondent no.2 by the D.P.C. About jurisdiction and scope of interference, learned counsel relied upon the decision of the Apex Court rendered in the matter of ***Badrinath –vs- Govt. of Tamil Nadu and others, AIR 2000 S.C.3243***.

(4) The contention of learned counsel for respondent no.2 was that though his one increment as Junior Engineer was withheld in the year 1984, but, thereafter, he was promoted from the post of Junior Engineer to the Post of Assistant Engineer by order dated 08.01.1990 (Annexure R-2/1) and on receiving promotion to the next higher post, the penalty imposed earlier was wiped out. So far other allegations in relation to a subsequent departmental enquiry are concerned, it was contended that the said departmental enquiry was dropped and as an advice, the respondent no.2 was only cautioned to be more careful in future and no penalty of warning was imposed against him as is alleged by the petitioner. He has filed the copy of order dated 18.7.1995 vide Annexure R-2/2 to support his contentions. Referring all these, it was argued that since

nothing adverse was prevailing against this respondent prior to the meeting of D.P.C. and he was senior to the petitioner, the D.P.C. has rightly recommended his name and his promotion was in accordance with law. Counsel for respondent no.1 & 3 also supported the case of respondent no.2.

(5) While dealing with the *Badrinath's case (supra)*, the Apex Court held vide Para 40 that unless there is a strong case for applying Wednesbury doctrine or there are malafides, Courts and Tribunal cannot interfere with the assessments made by the Departmental Promotion Committee in regard to the merit or fitness for promotion. In rare cases if the assessment is either proved to be malafide or is found based on inadmissible or irrelevant or insignificant and trivial material - and if an attitude of ignoring or not giving weight to the positive aspects of one's career is strongly displayed, or if the interference drawn are such that no reasonable person can reach such conclusions, or if there is illegality attached to the decision, - then the powers of judicial review under Article 226 of the Constitution are not foreclosed.

(6) Relying on and referring to various earlier pronouncements, the Apex Court summarized the principles vide para 59 as under:

(i) Under Article 16 of the Constitution, right to be 'considered' for promotion is a fundamental right. It is not the mere 'consideration' for promotion that is important but the consideration must be 'fair' according to established principles governing service jurisprudence.

(ii) Courts will not interfere with assessment made by Departmental Promotion Committee unless the aggrieved officer establishes that the non-promotion was bad according to the Wednesbury Principles or was it mala fides.

116

(iii) Adverse remarks of an officer for the entire period of service can be taken into consideration while promoting an officer or while passing an order of compulsory retirement. But the weight which must be attached to the adverse remarks depends upon certain sound principles of fairness.

(iv) If the adverse remarks relate to a distant past and relate to remarks such as his not putting his maximum effort or so on, then those remarks cannot be given weight after a long distance of time, particularly if there are no such remarks during the period before his promotion. This is the position even in cases of compulsory retirement.

(v) If the adverse remarks relate to a period prior to an earlier promotion they must be treated as having lost their sting and as weak material, subject however to the rider that if they related to dishonesty or lack of integrity they can be considered to have not lost their strength fully so as to be ignored altogether.

(vi) Uncommunicated adverse remarks could be relied upon even if no opportunity was given to represent against them before an order of compulsory retirement is passed.

(7) Therefore, it is clear that the consideration for the promotions must be fair and normally the Courts will not interfere with the assessment made by the D.P.C. unless non-promotion was bad according to the Wednesbury's principles and was mala-fide. The adverse remarks are to be given weightage on sound principles of fairness and the adverse remarks relating to a period prior to an earlier promotion are treated as having wiped of subject to the rider that if they relate to dishonesty or lack of integrity they can be considered to have not lost their strength fully so as to be ignored.

(8) In the present case, so far as the first point regarding punishment of with-holding of increment for one year is concerned, the document placed on record is the pay fixation order of June 1984 pertaining to many employees including the respondent no.2 and it has been mentioned that the increment of respondent no.2 was withheld for one year. Admittedly, this punishment was imposed on respondent no.2 while he was working as a Junior Engineer but after the said date, the petitioner and respondent no.2 both were promoted to the post of Assistant Engineer by a common order dated 08.1.1990 as per the recommendations of the then Departmental Promotion Committee. This order of promotion dated 08.1.1990 was never challenged by the petitioner or any other person. Why this punishment was imposed has not been brought on record.

(9) The Apex Court has stated in the matter of Badrinath (supra) that if the adverse remarks relate to a period prior to an earlier promotion they must be treated as having lost their sting and as week material subject to rider that if they relate to dishonesty or lack of integrity they can be considered to have not lost their strength fully so as to be ignored altogether. In ***Brij Mohan Singh –vs- State of Punjab AIR 1987 S.C. 1948,*** the Apex Court said that while considering the question of premature retirement, it may be desirable to make an overall assessment of government servant's record, but while doing that, more value should be attached to the confidential reports pertaining to the years immediately preceding such considerations. The apex Court laid down that it is possible that

a new entrant to a service may have committed mistakes and for that reason, he may have entered adverse remarks and if those entries of early years of service are taken into consideration for prematurely retiring a government employee then perhaps no employee would be safe even though he may have brilliant record of service in latter years. Relying on various other decisions referred to in para 7 of the said judgment, the Apex Court said that old and stale entries should not be taken into account while considering the question of premature retirement, instead, the entries of recent past of 5-10 years should be considered informing the requisite opinion to retire a Government employee in public interest. It would be unreasonable and unjust to consider adverse entries of remote past and to ignore the good entries of the recent past. The Apex Court opined that if the entries for a period of more than 10 years past are taken into account, it would be an act of digging out past to get some material to make an order against the employee. This decision of the Apex Court has been referred in *Badrinath's case* (supra). This all relates to adverse remarks and if we apply the principles laid down by the Apex Court to the case of a minor punishment like the present one, it can safely be said that in absence of any allegation of dishonesty or lack of integrity pertaining to the aforesaid minor punishment, the said minor punishment which was admittedly imposed prior to the year 1984 would be held to have lost its sting in the alleged D.P.C and promotion which took place in the year 1996, particularly, in the circumstance when another unchallenged promotion was granted to the petitioner and respondent no.2 in the year 1990 even after imposition of such a penalty, and I hold it accordingly. Therefore, the aforesaid punishment was not a point for consideration before the D.P.C. of 1996 and it cannot be said that if the same was ignored, the action of D.P.C. is vitiated on this count.

(10) About the second departmental enquiry, copies of proceedings dated 26.9.1994 *(Annexure P-4)* have been filed on record. It appears that 3 charges were leveled against respondent no.2 which were in relation to construction of some

road and a gist of the charges were that respondent no. 2 had not followed the technical norms and the material (*Mooram*) was used without conducting quality test and lastly there was some wrong measurement of the work done with an intention to give benefit to the Contractor. An explanation to the charges has also been mentioned in the said document.

(11) Learned counsel for respondent no.2 submits that though this enquiry was conducted, but no punishment pertaining to this enquiry was imposed against respondent no.2. He refers to the contents of document Annexure R-2/2 which is an order dated 18.7.1995 which shows that ultimately the proceedings of enquiry were dropped and respondent no.2 was only warned to be more careful in future while performing the work. The contents of Annexure R-2/2 are quoted as under:

"म0प्र0 औद्योगिक केन्द्र विकास निगम (रायपुर) लिमिटेड
(म.प्र. औद्योगिक विकास निगम लि0 भोपाल का सहायक उपकम)

कमांक केविनिरा/आर/95/2508 18/7/95

प्रति,

श्री डी.के. कुलश्रेष्ठ,
सहायक यंत्री,
म.प्र.औ.के.वि.नि. (रा) लि0,
रायपुर म.प्र.

विषयः– औद्योगिक विकास केन्द्र सिलतरा में डब्ल्यू.बी.एम. सड़क निर्माण कार्य में अनियमितता बाबत् – विभागीय जांच ।

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औद्योगिक विकास केन्द्र सिलतरा में डब्ल्यू.बी.एम. सड़क निर्माण कार्य में आपके द्वारा अनियमितता बाबत् विभागीय जॉच का प्रतिवेदन संचालक–मण्डल की 57 वीं बैठक दिनांक 20.3.95 मे प्रस्तुत किया गया था । संचालक–मण्डल की बैठक में पूर्ण विचारोपरांत यह निर्णय लिया गया है कि आप भविष्य में कार्य संपादन में सचेत रहें तथा जॉच की कार्यवाही समाप्त की जाती है ।

Sd/-
प्रबंध संचालक"

(12) If we go through the rules applicable in case of parties, it would appear that only the following have been held to be punishment/penalty as per rules of 1994-1995.

"(1) (क) परिनिंदा या जुर्माना,

(ख) वेतनवृद्धियॉ या पदोन्नति रोकना या स्थगित करना, जिसमें दक्षतारोध यदि कोई हो, पर रोकना सम्मिलित है ,

(ग) वेतनवृद्धि स्थायी रूप से रोकना,

(घ) उदासीनता या आदेशों के उल्लंघन के कारण निगम को हुई किसी आर्थिक क्षति की संपूर्ण या उसके किसी भाग की वेतन से वसूली ।

(ड) नियत वेतन पर समय–मान में किसी निम्न पद या वर्ग या किसी समयमान में किसी निम्न प्रावस्था में पदावनति,

(च) बरखास्तगी ।"

(13) A perusal of the relevant rule would show that the caution to be more careful in future, as has been advised to respondent no.2, even without completion of departmental enquiry, has not been defined as a punishment or penalty as per the said rules and it cannot be said that any penalty as envisaged under the Rules was imposed against respondent no.2 in the said departmental enquiry. Rather it comes on record that just after completion of the enquiry and filing of the enquiry report, the Board of Directors took a decision to drop the enquiry and they only issued a memo to respondent no.2 advising him to be more careful in future. Therefore, in the facts and circumstances it cannot be said that any punishment was standing against respondent no.2 pertaining to the aforesaid enquiry initiated against him prior to the said D.P.C. It was tried to substantiate that the aforesaid advice/direction to be careful in future would amount to a censure which has been held to be a penalty under the Rules. Needless to say that the censure cannot be equated with a warning because the censure is a penalty under the aforesaid Rules and the same can be imposed only after completion of a departmental enquiry and the punishment of the censure and simply issuance of an advice to be more careful in future without completion of enquiry are the species of two different geneses in service jurisprudence. There is no force in

this second argument advanced by learned counsel for the petitioner and the same cannot be accepted in the facts and circumstances of this case, particularly, when the enquiry itself was dropped and no penalty was imposed against the respondent no.2.

(14) Lastly, learned counsel for the petitioner referred to the note sheets of the department, written on the application of the petitioner filed on 12.12.2002 for giving him promotion with retrospective effect. He referred to the last page of these note sheets in which on 04.04.2003, the Managing Director has written for approval about the retrospective promotion of the petitioner by giving many reasons. These departmental note sheets subsequently written on 04.4.2003 on the application/ representation made by the petitioner on 12.12.2002 cannot be co-related with the proceedings of the statutorily constituted D.P.C., whose meeting took place way back in the year 1996 and the respondent no.2 was promoted as per its recommendations. In the opinion of this Court, these official note sheets are not helpful to the petitioner so far as prayer for quashment of promotion of respondent no.2 is concerned.

(15) Therefore, in the facts and circumstances, the assessment made by the D.P.C. regarding merit or fitness of respondent no.2 and the promotion in consequence thereof cannot be interfered with by this Court. The present is not a case in which the assessment is either malafide or is based on inadmissible or irrelevant or insignificant and trivial material. The respondent no.2 was senior to the petitioner and the criteria of seniority-cum-merit was to be applied, which has been applied and no grounds for interference therein are made out in this case.

(16) The petition has no merit and the same is dismissed. However, there shall be no orders as to costs.

Sd/-
Sunil Kumar Sinha
Judge